NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1.

Whether the courts of the State of Texas have subject matter jurisdiction to hear causes of action filed pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979)?

2.

Whether the rule of law regarding instructions to the jury that any award of damages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt,* 444 U.S. 490 (1980), is applicable and controlling in an action arising under the Outer Continental Shelf Lands Act?

LIST OF PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceeding in the court whose judgment is to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this case:

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L.A. Levy, Inc.
   Offshore Crews, Inc.
   Unknown underwriters at interest with the Levy entities, which assumed Respondent's defense.
2. Steven Gaedecke, Plaintiff.
3. Jamail, Kolius & Mithoff, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.[1]

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1. In accordance with the amendment of Rule 34.1(b) to refer to amended Rule 28.1, Petitioner takes this opportunity to advise that:
   1) Gulf Offshore Company, A Division of the Pool Company no longer exists as a seperate entity, having been totally absorbed by Pool Company.
   2) The parent company of Pool Company is ENSERCH Corporation.
   3) The non-wholly owned subsidiaries of Pool Company are Pool Arabia, Ltd. and Pool Santana, Limited.
   4) Affiliates of Pool Company are the following members of the ENSERCH Corporation group, many of which themselves have subsidiaries: ENSERCH Finance N.V., Ebasco Services Incorporated, Enserch Domestic International Sales Corporation, Intairdril (Aust.) Pty. Ltd., Irano-Intairdril S.S.K., Lone Star Gas Company of Texas, Inc., LSG Intragas, Inc., Lone Star Gathering Company, Solus Ocean Systems, Inc., Solus Ocean Systems La. Inc., Samson Ocean Systems, Inc., Associated Oiltools, Inc., Enserch Canadian Exploration, Inc., LS Engery, and Enserch Exploration, Inc.

6. Underwriters subscribing Policy No. J.F.X. 0007, issued to ENSERCH Corp. and Pool Offshore Company.

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BRIEF FOR PETITIONER

OPINION AND JUDGMENTS BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas is reported at 594 S.W.2d 496 and is printed in the Joint Appendix, beginning at page 19. The judgment entered by the Court of Civil Appeals is printed in the Joint Appendix at page

37. The Supreme Court of Texas denied Application for Writ of Error with the notation "no reversible error" and notification of such is printed in the Joint Appendix at page 40. The judgment entered by the 129th Judicial District Court of Harris County, Texas is printed in the Joint Appendix beginning at page 13.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on December 12, 1979. A timely Motion for Rehearing was filed on December 27, 1979, and overruled on January 9, 1980. Application to the Supreme Court of Texas for a Writ of Error, filed February 8, 1980 was refused without opinion with the notation "no reversible error" on June 18, 1980. A timely Motion for Rehearing, filed July 3, 1980, was overruled on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). [The opinion of the Court of Civil Appeals deals in pertinent part with federally created rights under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979).] This Court granted certiorari on December 8, 1980.

STATUTE INVOLVED

Section 1333 of Title 43 of the United States Code, as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the outer Continental Shelf and all artifiicial islands and fixed structures erected thereon.

Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose.

Subsection (a) provided that:

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State; *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf,

and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. *All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.* State taxation laws shall not apply to the outer Continental Shelf. (Emphasis supplied).

(3) The provisions of this section for adoption of State law as the law of the United States shall *never* be interpreted as a basis for claiming any interest in *or jurisdiction* on behalf of any State *for any purpose* over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. (Emphasis supplied).

STATEMENT OF THE CASE

This is an oil company (Respondent Mobil)/drilling contractor (Petitioner Gulf Offshore) contractural indemnity case arising in the area governed by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979). Respondent Mobil's action for contractural indemnity against Petitioner was brought as a third party action in a suit by a personal injury plaintiff, Gaedecke, against Respondent Mobil, which action also arose in the area governed by the Lands Act.

On July 9, 1974, Petitioner and Respondent Mobil entered into Contract No. 1159, which concerned oil well completion operations to be performed by Petitioner on Respondent Mobil's platform wells situated in Grand Isle Block 95 offshore of the State of Louisiana on the outer Continental Shelf.

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula into the Gulf of Mexico and regained

strength, necessitating evacuation of offshore oil platforms in the Gulf, including the platform upon which Petitioner was performing its completion work for Respondent Mobil.

Personal injury plaintiff Gaedecke was injured on September 22, 1975, following his evacuation from the platform to a work boat.

Plaintiff Gaedecke sued Respondent Mobil and three additional companies associated with the work boat, L. A. Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc. for personal injuries sustained as a result of the accident. Respondent Mobil filed a Third Party Complaint against Petitioner, alleging liability for indemnity on both tort and contract theories.

Prior to trial, Plaintiff Gaedecke entered into a novel "settlement" agreement with Respondent Mobil and the Levy defendants, which had assumed Respondent Mobil's defense. Plaintiff proceeded solely against Respondent Mobil which, in turn, sought only *contractual* indemnity from Petitioner.

Trial was to a jury, which found that Respondent Mobil, by its negligence as offshore platform owner, proximately caused the injuries to Plaintiff. Damages of $900,000.00 were found. The jury also found that Plaintiff's injuries were incident to or resulted directly or indirectly from the work of Petitioner under its contract with Respondent Mobil. Judgment for $900,000.00 was rendered in favor of Plaintiff against Respondent Mobil, out of which the Intervenor was awarded recovery of the sum of $32,712.09, its workers' compensation lien. Judgment for contractual indemnity in the amount of $900,000.00 was rendered against Petitioner.

Petitioner first raised the federal question pertaining to subject matter jurisdiction to be reviewed herein by its First Amended Answer to Respondent's Third Party Complaint. (J.A. 5).[2] Petitioner objected to the court's lack of subject matter jurisdiction in such answer and again raised the point by Motion for Summary Judgment prior to trial. (R. 123-125). The point was renewed in Petitioner's Motion for Instructed Verdict (R. 205-211), in Petitioner's Motion for Judgment Non Obstante Veredicto (R. 213-216), in Petitioner's Amended Motion for New Trial (R. 276-282) and as Petitioner's first point on appeal to the Court of Civil Appeals and to the Supreme Court of Texas.

The special exception to the lack of subject matter jurisdiction contained in the answer, Motion for Summary Judgment, Motion for Instructed Verdict, Motion for Judgment Non Obstante Veredicto and Amended Motion for New Trial were all overruled by the trial court. The Court of Civil Appeals affirmed the trial court's judgment, holding that the courts of the State of Texas have subject matter jurisdiction. The Supreme Court of Texas denied Petitioner's Application for Writ of Error.

Petitioner raised the federal question regarding appropriate instruction to the jury on the issue of taxation of any damage award by requesting that an instruction be given to the jury on the issue. Instruction C was requested in a timely and appropriate fashion prior to finalization of the jury charge but was refused by the trial court. (J.A. 11-12). Denial of the requested instruction was set forth as a reason for granting a new trial in Petitioner's

2. "J.A." refers to the Joint Appendix; "R." refers to the clerk's Transcript in the Court of Civil Appeals in which the pages are consecutively numbered.

Amended Motion for New Trial (R. 281), but such motion was overruled. The point was preserved in the appeal to the Court of Civil Appeals as Point of Error 13. The Court of Civil Appeals affirmed the trial court on the point. The issue was carried forward as the Twelfth Point of Error in Petitioner's Application for Writ of Error to the Supreme Court of Texas, but the Application was denied.

SUMMARY OF ARGUMENT

I. In considering and enacting into law the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1979), Congress recognized that it was not dealing with an area of concurrent federal and state political jurisdiction. With respect to the outer Continental Shelf, there was no historical federal or state political jurisdiction and the question was to what extent federal political jurisdiction could be *extended* into the area. The legislative history of the Lands Act establishes that Congress made a conscious decision to extend only *federal* political jurisdiction to the outer Continental Shelf. The Senate, whose bill became the Lands Act, specifically rejected amendments which would have concurrently extended state political jurisdiction to the outer Continental Shelf area. Given this context, it can be seen that it was not necessary for Congress to specifically provide that federal court jurisdiction would be exclusive because without concurrent state political jurisdiction in the area, state police power, including state court jurisdiction to adjudicate, could not exist.

The language of the Lands Act, read in the context of its enactment, leaves no doubt that jurisdiction of the federal courts was to be exclusive. 43 U.S.C. § 1333(b),

the legislative grant of jurisdiction to the federal courts, contained no concurrent extension of judicial power to state courts. Subsection (a)(1) of 43 U.S.C. § 1333 extends only *federal* political jurisdiction to the outer Continental Shelf area. 43 U.S.C. § 1333(a)(2) provides for administration and enforcement of the applicable laws by the appropriate officers and courts of the United States, without any mention of enforcement by state courts. Finally, subsection (a)(3) of Section 1333 contains a specific denial of any state assertion of jurisdiction for any purpose.

The legislative history of the Lands Act is a useful tool in resolving the issue whether federal court jurisdiction over Lands Act cases is exclusive and conclusively demonstrates the understanding and intent of Congress that federal court jurisdiction would be exclusive.

This Court's discussion of the history of the passage of the Lands Act in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), evidences this Court's appreciation that the conflicting forces at work with respect to passage of the Lands Act resulted in state law becoming federal law *federally* enforced.

The 1978 amendments to the Lands Act did not alter the exclusivity of federal court jurisdiction because the amendments did not set forth a grant of concurrent state political jurisdiction or jurisdiction to adjudicate, changing the existing law. The unexplained deletion of the word "original" from the section pertaining to federal district court jurisdiction is insignificant, particularly in view of the legislative history which indicates that the renumbered jurisdictional provision simply reincorporates the 1953 law.

II. The trial court's refusal to instruct the jury that its award of damages, if any, would not be subject to federal income taxation is reversible error in light of this Court's decision in *Norfolk & Western Railway Company v. Liepelt,* 444 U.S. 490 (1980). In *Liepelt,* this Court held that it was reversible error for a trial court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested that the trial court give the jury virtually the same instruction, which was refused.

Petitioner's requested jury instruction was properly tendered and the error of the trial court's rejection of it was properly preserved. The requested instruction was based on reasonable inferences that might be drawn from the evidence, which is the appropriate legal standard in Texas. The error in refusing the instruction was properly preserved, as most eloquently demonstrated by the Court of Civil Appeals' discussion of the point on the merits in its opinion.

Although *Liepelt* addressed the jury instruction issue in the context of a wrongful death action brought under the FELA, the holding is clearly applicable in this case arising under the Lands Act. The Court of Civil Appeals recognized the applicability of the Lands Act to all aspects of this case. This Court's opinion in *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), makes it clear that under the Lands Act the applicable law is federal law with the law of the state adjacent to the fixed platform in question to be utilized only to fill "gaps" in the controlling federal law. In *Liepelt,* this

Court reaffirmed the established principle that questions concerning the measure of damages in federal actions are federal in character and governed by federal law. Consequently, the law of the adjacent state in this case, Louisiana, and, additionally, the law of the forum state, Texas, with respect to the requested jury instruction was irrelevant and, upon Petitioner's request, the trial court should have given the *Liepelt* type instruction. There is no gap in the federal law on the question of the appropriateness of a *Liepelt* jury instruction. The policy considerations relied upon in *Liepelt* clearly apply in Lands Act cases.

Respondent Gaedecke's personal injury case was, of necessity, predicated on rights created and controlled by the Lands Act so that the assertion of common law negligence in an effort to make the *Liepelt* decision inapplicable is incorrect.

The *Liepelt* rule of law is controlling in this matter even though the decision was handed down after the trial court's refusal of the requested instruction. The federal Circuit Courts of Appeals have uniformly applied *Liepelt* retroactively.

ARGUMENT ON THE MERITS

Two questions are presented for decision in this case. The first is the basic, fundamental question whether the courts which tried and reviewed the case on appeal, the courts of the State of Texas, had subject matter jurisdiction. The second involves the applicability and effect, in the context of this Outer Continental Shelf Lands Act (hereafter "Lands Act") litigation, of the rule of law regarding instruction to the jury that any award of dam-

ages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980). Petitioner's position with respect to these questions is set forth below.

I.

THE OUTER CONTINENTAL SHELF LANDS ACT VESTS SUBJECT MATTER JURISDICTION OVER CASES ARISING UNDER THE ACT EXCLUSIVELY IN THE FEDERAL COURTS

At virtually every stage of the proceedings in the trial court, including pre-trial, trial and post-trial, Petitioner objected to the state court's assertion of subject matter jurisdiction in regard to both plaintiff's personal injury action against Respondent Mobil and its contractual indemnity action against Petitioner on the ground that both actions arose under the Lands Act and, as such, had to be brought in federal district court. This fundamental error was emphasized on appeal, but the Court of Civil Appeals, and, implicitly, the Supreme Court of Texas, held that the Lands Act neither intended nor required exclusive jurisdiction in the federal courts, becoming the only courts having considered the question to so hold.[3]

The applicability of the Lands Act to plaintiff's personal injury action against Respondent Mobil and its

3. Cases in direct conflict with the Court of Civil Appeals, holding that subject matter jurisdiction is exclusively federal, are *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), *Borne v. Tenneco Oil Company*, 1973 A.M.C. 388 (E.D. La. 1972), *Friedrich v. Whittaker Corporation*, 467 F.Supp. 1012 (S.D. Tex. 1979), *Gravois v. Travelers Indemnity Company*, 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301), and *Pool v. Kemper Insurance Group*, 386 So.2d 1006 (La. App. 1980). These decisions are discussed in the Petition for Writ of Certiorari and Petitioner's Reply Brief to Respondents' Briefs in Opposition to Petition.

contractual indemnity action against Petitioner was recognized by the Texas Court of Civil Appeals, which also acknowledged that the Lands Act establishes the structure of remedies for fixed platform workers on the outer Continental Shelf and substantively controls other disputes arising in the area governed by the Act, such as the subject contractual indemnity action. Consequently, the focus of Petitioner's disagreement with the Court of Civil Appeals is on the question of *exclusivity* of federal court subject matter jurisdiction over the remedies of workers such as the plaintiff and suits such as the contractual action brought by Respondent Mobil.

The opinion of the Court of Civil Appeals upholding state court subject matter jurisdiction hinged on the absence of the word "exclusive" in the statute's jurisdictional section, Section 1333(b). At the outset, it should be recognized that in the enactment of the Lands Act, Congress was not dealing with an area of concurrent federal and state political jurisdiction. Congress was not confronted with a situation requiring a specific grant of federal jurisdiction to the preclusion of an existing state right or jurisdiction, but was involved in extending federal jurisdiction into an international area outside of any historical area of state jurisdiction. A reading of the statute as a whole in the context of its enactment leads inevitably to the conclusion that Congress intended federal political jurisdiction, federal policy, and federal law in the Lands Act area to be judicially governed exclusively by the federal courts.

Petitioner does not ask that this Court augment the language of the statute by supplying any allegedly omitted terminology. Rather, Petitioner solicits this Court's recog-

nition that in the context of the enactment of the Lands Act, the statutory language employed by Congress clearly expresses a grant of jurisdiction over cases arising under the Act to the federal courts with no concurrent jurisdiction being extended to the states adjacent to the outer Continental Shelf area. Congress did not need to employ language granting "exclusive" jurisdiction to federal courts because the action of Congress in *extending* federal political jurisdiction into the void represented by the outer Continental Shelf area while rejecting a contemporaneous extension of concurrent state political jurisdiction into the area could lead to no other conclusion than that state power was not to be extended to apply in the area.

A. The Lands Act extension of federal, but not state, political jurisdiction to the shelf area made a specific grant of exclusive federal court jurisdiction unnecessary

The absence of the word "exclusive" in the section of the Lands Act granting jurisdiction to the federal district courts, Section 1333(b), is not significant in view of the context of the enactment of the Lands Act. Study of the hearings conducted by the Senate Committee on Interior and Insular Affairs, the Report of that Committee, and floor debate in connection with passage of the Senate bill (S. 1901[4]) makes it clear that the problem

4. Passage of a Lands Act bill was a legislative priority in 1953 as development of offshore mineral resources could not proceed in an orderly fashion until such a statute was passed. A bill was introduced in the House of Representatives to add a third section to the Submerged Lands Act. The bill introduced in the Senate represented independent legislation. The House legislation was passed by the House of Representatives and forwarded to the Senate for consideration. The Senate proceeded to consider its own bill and once it was

of legislating jurisdiction in the area of the outer Continental Shelf was *sui generis* vis-a-vis our system of federalism. The question of jurisdiction in the outer Continental Shelf area was unlike that involving military installations or national parks within the various states. With respect to the outer Continental Shelf, there was no historical state or federal political jurisdiction.

The report to the Senate Committee submitted on behalf of the Attorney General, set forth in the Committee Report, is particularly instructive in this regard:

> This *id est* [the outer Continental Shelf] is a Federal area, outside State boundaries and to give the States a sort of extraterritorial jurisdiction over it is unnecessary and undesirable. The situation is not comparable to that of federally owned areas within a State, as to which State law has some measure of applicability. Particularly in view of the intermingling of national and international rights in the area, it is important that the Federal Government, which has the responsibility for handling foreign relations, have the exclusive control of lawmaking and law enforcement there.

S. Rep. No. 411, 83d Cong., 1st Sess. 6 (1953).

It is clear that Congress approached the question of political jurisdiction in the outer Continental Shelf area as one with international implications and that this was

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in final form the Senate struck all of the House bill language after the enacting clause and amended the House bill by inserting the language of the Senate bill. The legislation went to conference and following changes immaterial to the subject matter jurisdiction issue, the legislation was reported favorably to both Houses and the Lands Act was passed. Consequently, the legislation bore the House bill number, but the Senate bill is essentially what became the Lands Act and the legislative history of the Senate bill is, therefore, pertinent.

a significant policy reason for unifying administration and enforcement in the Federal Government and courts. The task was to extend political jurisdiction into an international jurisdictional void and this sparked serious debate over the terminology to be used, i.e., whether *sovereignty* should be extended or some lesser concept such as "jurisdiction and control." The basis of the approach ultimately taken with respect to the legislation is found in the prepared statement to the Senate Committee by the deputy legal advisor to the Secretary of State, set forth in the Senate Report. S. Rep. No. 441, 83d Cong., 1st Sess. 41 (1953). The following excerpt from that text is illustrative:

> The assertion of jurisdiction and control in accordance with the President's 1945 proclamation is believed to be preferable to an assertion of sovereignty. Sovereignty, traditionally an absolute concept, might be regarded as affecting the freedom of the waters and the airspace above the seabed and subsoil despite the disclaimers to the contrary.

From this background it is evident that the legislative grant of jurisdiction to adjudicate embodied in Section 1333(b) of the Lands Act was, of necessity, an exclusive grant. Normally, our system of dual federal-state sovereignty would require adherence to the concept that the jurisdiction of federal district courts is limited, not general, and that jurisdiction to adjudicate exists concurrently in state courts unless the exclusivity of federal court jurisdiction is stated in specific, unequivocal language. In the area of the outer Continental Shelf, however, there was no historical system of dual federal-state sovereignty or concurrent political jurisdiction with con-

comitant jurisdiction to adjudicate. No question of "preemption" existed in regard to jurisdiction in that area. The question was to what extent federal political jurisdiction could be *extended* into the area, not to what extent it should be shared.[5]

It would have been redundant for Congress to modify the jurisdictional grant to federal district courts in Section 1333(b) of the Lands Act with the word "exclusive". Federal courts are generally courts of limited jurisdiction, dependent upon a specific grant of jurisdiction and, if desired, of "exclusive" jurisdiction. State courts are courts of general jurisdiction. However, in the outer Continental Shelf area there was no concurrent jurisdiction to adjudicate to be considered since state political jurisdiction and concomitant jurisdiction of the state courts to adjudicate did not extend over that area. This view of the grant of jurisdiction set forth in Section 1333(b) of the Lands Act is fully supported by the legislative history of the statute and, specifically, by the fact that opponents of the Lands Act sought on several occasions to amend the legislation under consideration to specifically extend state power to the outer Continental Shelf area and such efforts were consistently rejected.

This Court has previously made reference to one of these amendments in connection with the issue whether the Death on the High Seas Act was applicable in the

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5. In *United States v. California*, 332 U.S. 19 (1947), this Court held that the states situated adjacent to the outer Continental Shelf had no title to or property interest in the three-mile marginal belt of submerged lands off their coast outside inland waters and that the Federal Government had paramount rights in and power over that area. Obviously, this analysis would apply with even greater force to the area of the outer Continental Shelf seaward of the three-mile marginal belt.

context of a wrongful death occurring on an artificial island in the area governed by the Lands Act. *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352, 359 (1969). As observed by this Court, Senator Russell Long of Louisiana unsuccessfully sought to amend the Act to make the laws of each adjacent state applicable to the newly acquired area and to make the officials of such states the agents empowered to enforce the laws of the state in the newly acquired area.

Actually, the amendment discussed in *Rodrigue* was the second amendment proposed by a Senator from Louisiana. The first was proposed by Senator Ellender and was considered immediately before Senator Long's amendment. The purpose of Senator Ellender's proposed amendment was stated most succinctly by its author:

> My amendment is very simple and it would clarify a multiplicity of problems which are bound to arise. It would give coastal States the right to extend their jurisdiction to these lands. For what purpose? Merely for the purpose of administering the criminal and civil laws which may pertain to that area.

99 Cong. Rec. 7230 (1953).

This amendment offered by the senior Senator from Louisiana, Senator Ellender, was opposed on the floor by Senator Cordon, manager of the bill on behalf of the Committee on Interior and Insular Affairs. The position of the Committee was expressed by Senator Cordon as follows:

> The issue is whether an area which is entirely outside the boundaries of a State in an area of exclusive Federal jurisdiction shall, in effect, be placed within the boundaries of an abutting State. The committee

> felt that the boundaries of the coastal States should not be so extended. I believe the Senate entertains the same view.

In response to a question posed by Senator Ellender concerning a hypothetical murder committed on an artificial island in the Lands Act area and, specifically, where the accused would be tried, Senator Cordon responded:

> The bill provides for jurisdiction by the district courts of the United States. So in the instance referred to by the Senator from Louisiana, jurisdiction would be either in the district court of the district in which the defendant was found or in the district court of the district nearest where the act occurred; and either represents jurisdiction within the meaning of the law and the Constitution.

99 Cong. Rec. 7231-7232 (1953).

Following limited debate on the first amendment offered by Senator Ellender, it was rejected. See 99 Cong. Rec. 7228-7232 (1953).

As indicated above, the second proposed amendment was that of Senator Long, which would have had the same effect as the one offered by Senator Ellender except that it did not provide for taxing power in the states. In explaining the amendment to the Senate, Senator Long recognized the distinction between the creation of an area of exclusive jurisdiction within a state and the extension of political jurisdiction into the void of the outer Continental Shelf in connection with jurisdiction to adjudicate. The Senator's explanation was as follows:

> Under the amendment I am proposing, the structures erected upon the subsoil would be treated as though

> they were erected on Federal lands located within the State. The Senator from Nevada is thoroughly familiar with Federal lands in the States, because the Federal Government owns most of the land of the great State of Nevada. When a crime is committed, the local sheriff can arrest the culprit, bring him back to the local district and incarcerate him there, and trial can be had in a State court before a jury of his peers. Otherwise, it is a matter of *exclusive* Federal jurisdiction, and it would be necessary to take the culprit to a Federal district court. Likewise, any dispute arising among citizens would have to be settled in a Federal district court. (Emphasis Supplied).

99 Cong. Rec. 7233 (1953).

Later in the debate, Senator Long commented on the effect of a possible failure of the amendment to pass:

> On the other hand, if the amendment fails of adoption, with respect to any disputes which may arise or with respect to violations of law, those accused or involved would have to be taken 100 miles away to the Federal district court at New Orleans, La.

99 Cong. Rec. 7234 (1953).

Senator Ellender spoke in support of Senator Long's amendment and, pertinent to the question of state court jurisdiction, had the following remarks:

> [W]hen the bill was first introduced, it contemplated having our maritime laws apply. In section 4, the laws applicable to the outer Continental Shelf were to be the same as those which apply to a ship. It was sought to treat the platforms or artificial islands created in the water as ships, thereby applying to those islands the same jurisdiction, so far as Federal

> laws are concerned, as in the case of ships, so that in the event a crime were committed on one of these artifical islands, the Federal Government would have jurisdiction under our maritime laws. However, in the course of the hearings, and when the bill was redrafted, that approach was discarded. These islands are made subject to our domestic law, to be administered *exclusively* through the Federal courts, rather than treating them as ships. (Emphasis supplied).
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> * * *
>
> [U]nless the amendment is agreed to, and provided, of course, that an accused person did not invoke the sixth amendment, the District courts would have to try every little misdemeanor that occurred in the area, because section 4(2) of the bill provides that all such applicable laws—that is, State laws, Federal laws, and rules and regulations that may be made by the Secretary of the Interior—shall be administered by the appropriate officers and courts of the United States. *It excludes the State courts entirely*. (Emphasis supplied).

99 Cong. Rec. 7235 (1953).

As this Court noted in *Rodrigue*, Senator Long's amendment was rejected.

Finally, when the Senators from Louisiana were convinced that state political jurisdiction and concomitant state court jurisdiction to adjudicate were not to be extended into the outer Continental Shelf area, Senator Long proposed an amendment to make it clear that venue would be in the judicial district of the adjacent state. This clarifying amendment received the support of Senator Cordon, the manager of the bill on behalf of the Senate Committee and the amendment was adopted. Of par-

ticular interest is Senator Long's explanation of the purpose of the amendment:

> *Inasmuch as Congress has decided in favor of exclusive Federal jurisdiction when some case or controversy may arise on the outer Continental Shelf,* it should be made clear that the judicial district in which the case will be tried will be the judicial district which would be within the extended State lines, if the lines were to be extended under that section. (Emphasis supplied).
>
> * * *
>
> This amendment would simply make clear that those cases would be tried within one of the Federal districts within the State within the adjacent State.

99 Cong. Rec. 7257 (1953).

In summary, the context of the enactment of the Lands Act provides the answer as to why the Lands Act vests subject matter jurisdiction over cases arising under the Act exclusively in the federal courts without the necessity of the word "exclusive" in the grant of jurisdiction to the federal district courts. In retrospect, the answer is relatively simple. It was not necessary to specifically provide that federal court jurisdiction would be exclusive because absent concurrent state political jurisdiction in the area, state police power, including state court jurisdiction to adjudicate, could not exist in the area.

B. The statutory language of the Lands Act leaves no doubt that federal court jurisdiction is exclusive

Although it is clear from the background and development of the Lands Act, as discussed in the preceding

section, that jurisdiction over cases and controversies arising in the outer Continental Shelf area is exclusively federal, the statutory language of the Lands Act itself leaves no doubt concerning the exclusivity of federal court jurisdiction.

Plaintiff's accident occurred on September 22, 1975, and suit was originally filed on November 20, 1975 (R. 2). The indemnity action was filed by Respondent Mobil on February 10, 1977 (R. 16). Thus, the statutory references pertinent to this question are the provisions of the Lands Act as they appeared at those material times. The Lands Act was amended on September 18, 1978, and the section discussing federal court jurisdiction was renumbered, but, as will be discussed subsequently, absolutely no change material to the question of the exclusivity of subject matter jurisdiction in the federal courts was effected.

Section 1333 of Title 43 of the United States Code as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed of the outer Continental Shelf and all artificial islands and fixed structures erected thereon. Subsection (b) specifically pertained to jurisdiction of the United States District Courts and provided as follows:

> The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceed-

> ings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose.

As discussed at length in the preceding section, the absence of the word "exclusive" in Subsection (b) is immaterial because Congress refused to extend state political jurisdiction to the outer Continental Shelf area. There being no state sovereignty in the area or concomitant jurisdiction to adjudicate, the fact that Congress granted jurisdiction to the federal district courts in Subsection (b) means, *ipso facto,* that such subject matter jurisdiction is exclusive.

Subsection (a) (1) provided that:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

This subsection extended federal political jurisdiction into the outer Continental Shelf area. As discussed, the absence of a concurrent extension of state political jurisdiction is extremely significant.

Subsection (a)(2) declared, and as amended still declares, the civil and criminal laws of the adjacent states

to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf and all artificial islands and fixed structures erected thereon to the extent that they are applicable and not inconsistent with federal laws and regulations.

The next to the last sentence of that subsection is particularly significant, as it provided, and still provides that:

> All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.

This language is demonstrative of Congressional intent that subject matter jurisdiction exist exclusively in the federal courts. Had Congress intended that the applicable laws be enforced in state courts it would have said so. The unsuccessful amendments proposed by the Senators from Louisiana emphasize the intent of Congress that the laws applicable to the outer Continental Shelf area be enforced exclusively in the federal courts.

If further indicia of the exclusivity of federal jurisdiction over cases and controversies arising out of or in connection with operations conducted on the outer Continental Shelf is required, Subsection (a)(3) of Section 1333 should resolve any doubts. That subsection provided, and continues to provide that:

> The provisions of this section for adoption of State law as the law of the United States shall *never* be interpreted as a basis for claiming any interest in *or jurisdiction* on behalf of any State *for any purpose* over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. (Emphasis supplied).

Finally, the policy of the United States with respect to its exercise of jurisdiction over the subsoil and seabed of the outer Continental Shelf is clearly set forth in 43 U.S.C. § 1332 (Supp. 1979), and this, in conjunction with the other expressions of exclusive federal jurisdiction found in the Act, works to clearly demonstrate that the adjacent states and their state courts have never historically or by legislative action had jurisdiction over matters arising in the outer Continental Shelf area.

C. The legislative history of the Lands Act conclusively demonstrates the understanding and intent of Congress that federal court jurisdiction over Lands Act cases would be exclusive

Respondent Mobil has expressed the view that legislative history may not be consulted to determine the meaning of unambiguous statutory language. (Mobil's Brief in Opposition to Petition p. 5). However, this Court has previously noted that such an approach is "an axiom of experience [rather] than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41, 48 (1928). Petitioner concurs with this Court's view, expressed in *United States v. Dickerson,* 310 U.S. 554, 561-562 (1940):

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by ex-

> perience to be workable; they can scarcely be deemed to be incompetent or irrelevant.
>
> * * *
>
> The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

Legislative history in the form of the Report of the Senate Committee on Interior and Insular Affairs and debate on the floor of the Senate regarding proposed amendments to the Act has previously been discussed. There can be no doubt that it was the understanding of the Senate, whose bill with various unrelated amendments became the Lands Act, that the legislation would result in exclusive federal court jurisdiction. Similarly, it cannot be disputed that this was also the *intent* of the Senate in view of the rejection of amendments seeking to extend state political jurisdiction and concomitant jurisdiction to adjudicate.

Perhaps the most eloquent evidence of the intended effect of the Lands Act in regard to court jurisdiction is the Minority Report to the Report of the Senate Committee on Interior and Insular Affairs by Senator Russell Long of Louisiana. Senator Long reported as follows:

> Many thousands of Louisiana citizens who live under a long established and well understood system of both Federal and State law—enforced as the case might be by both Federal and State officials—under the provisions of this bill, will perform their labors in an area governed by a curious and complex mixture of Federal and State laws, administered only by Federal officials, with power in the Secretary of Interior to abrogate State laws by regulation. *A resident of Morgan City, La., who might become a party*

> *to litigation arising in the outer Continental Shelf, will bear the expense of having his rights litigated—no matter how insignificant they might be—in a Federal court many miles removed from his domicile, rather than in his nearby parish courthouse.* (Emphasis supplied).

S. Rep. No. 411, 83d Cong., 1st Sess. 66 (1953).

D. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) recognized, sub silentio, the exclusivity of federal court jurisdiction over Lands Act cases

Although the precise question presented herein was not at issue, the decision of this Court in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), clearly reflects in its consideration of the history of the passage of the Lands Act that the intention of the Act was that it vest exclusive jurisdiction in the federal courts. Discussing the hearings held before the Senate Committee on Interior and Insular Affairs with respect to the applicability of maritime law to injuries occurring on fixed structures on the outer Continental Shelf, the Court noted as follows:

> On the other hand, federal enforcement of the law in this area was insisted upon by the Department of Justice, and there was substantial doubt whether state law and jurisdiction could or should be extended to these structures. A federal solution was thought necessary. 395 U.S. 352, 364.

With respect to the compromise which emerged, the Court had these observations:

> The administration's opposition to committing these areas solely to the jurisdiction of state courts, state

> substantive law, and state law enforcement was recognized in that *the applicable law was made federal law enforceable by federal officials in federal courts.* But the special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families was also recognized by dropping the treatment of these structures as "vessels" and instead, over the objections of the administration that these islands were not really located within a State, the bill was amended to treat them "as if [they] were [in] an area of exclusive Federal jurisdiction located within a State." *State law became federal law federally enforced.* 395 U.S. 352, 365. (Emphasis supplied).

This Court's decision in *Rodrigue* was obviously based upon a careful reading of the legislative history of the Lands Act. As discussed in Subsection A, above, such a review of the background of the enactment of the Lands Act could lead to no conclusion other than that jurisdiction over cases and controversies arising in the Lands Act area was vested *exclusively* in the federal courts. Petitioner submits that such is reflected in this Court's carefully selected language in *Rodrigue.*

E. The 1978 amendments to the Lands Act did not alter the exclusivity of federal court jurisdiction

By amendment effective September 18, 1978, the Lands Act grant of jurisdiction to the federal district courts was removed from Section 1333 of Title 43 and inserted as Subsection (b)(1) of a new Section 1349.

The Court of Civil Appeals' opinion noted that the word "original" was omitted from the new jurisdictional section and attached significance to this omission. The

absence of the word "original" from the current text lends no support to Respondents' position regarding exclusivity, and, to the contrary, the 1978 amendments lend support to Petitioner's position. A grant of "jurisdiction" is indistinguishable from one of "original jurisdiction" insofar as the federal courts are concerned. Moreover, in view of the development of the Lands Act, i.e., the concept of extension of federal political jurisdiction without a concurrent extension of state political jurisdiction, the failure of the 1978 amendments to the Lands Act to set forth a clear grant of concurrent state political jurisdiction or jurisdiction to adjudiciate, changing the existing law, militates in favor of Petitioner's position. As the legislative history of the Lands Act reflects, Congress could not, by the simple device of omitting the word "original", empower state courts to hear cases arising under the Lands Act. What would be required would be amendatory language *extending* state political jurisdiction to the outer Continental Shelf such as was rejected time and again at the time of passage of the original Act.

Finally, legislative history regarding reincorporation of the jurisdictional provision previously found in Section 1333(b) into the new Section 1349(b)(1) reflects that the Conference Committee followed the House version of the amendment providing for jurisdiction in the district courts by simply *restating* Section 1333(b) of the 1953 law. S. Conf. Rep. No. 95-1091, 95th Cong., 2d Sess. 114 (1978).

Respondent Mobil's contractual indemnity action against Petitioner was dependent upon a finding of liability against it with respect to the plaintiff's action. No such judgment rendered by the trial court could be valid as it

lacked subject matter jurisdiction and, consequently, there was no predicate for the judgment of indemnity against Petitioner. Additionally, the third party action of Respondent Mobil was, itself, dependent upon the Lands Act and, consequently, the trial court was similarly without subject matter jurisdiction over that action. Again, no valid judgment of indemnity could be rendered.

The absence of subject matter jurisdiction over plaintiff's personal injury case against Respondent Mobil and its contractual indemnity case against Petitioner constitutes fundamental error. The trial court should not have retained jurisdiction and it had no power to render the judgment of contractual indemnity in favor of Respondent Mobil. Both the Court of Civil Appeals and Supreme Court of Texas should have dismissed the case for want of jurisdiction and had no power to affirm the judgment. A court that is without subject matter jurisdiction has no authority to render any judgment other than one of dismissal. *Southwestern Bell Tel. Co. v. City of Kountze,* 543 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976); *City of Beaumont v. West,* 484 S.W.2d 789 (Tex. Civ. App.—Beaumont 1972, writ ref. n.r.e.); and *Barnes v. Bituminous Casualty Corp.,* 495 S.W.2d 5 (Tex. Civ. App.—Amarillo 1973, writ ref. n.r.e.).

II.

THIS COURT'S DECISION IN LIEPELT IS APPLICABLE AND CONTROLLING IN THIS LANDS ACT CASE

The Court of Civil Appeals held that the trial court committed no error in denying Petitioner's requested Jury Instruction C, designed to make the jury aware that any

award of damages would not be subject to federal income taxation. This decision is in direct conflict with this Court's holding in *Norfolk & Western Railway Company v. Liepelt,* 444 U.S. 490 (1980). In *Liepelt,* this Court held that it was reversible error for the trial court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested a similar, brief and easily understood instruction, which was refused.[6]

A. The holding in Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490 (1980)

The *Liepelt* case brought before this Court, in the context of a wrongful death action brought under the Federal Employer's Liability Act (FELA), the dual issues:

1) Whether it was error for the trial judge to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings; and

2) Whether it was error for the trial judge to refuse to instruct the jury that any award of damages would not be subject to federal income taxation.

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6. Petitioner's requested Instruction C was as follows:
You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes (R. 199), and printed in the Joint Appendix at page 12.

The holding of the Court was that it was reversible error for the trial court to:

1) Exclude evidence offered to show the effect of income taxes on the decedent's estimated future earnings; and

2) Refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award."

Central to the holding was the established view that questions concerning the measure of damages in actions predicated on federally created rights are federal in character and governed by federal law even where the action is pending in state court.

In Section II of the Opinion, regarding the requested jury instruction, this Court addressed the various policy considerations favoring the instruction, including the increased significance of federal income taxes, the "tax consciousness" of the American public, the fact that giving the instruction can do no harm and the fact that giving the instruction will eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

B. Procedural considerations — Petitioner's requested instruction was properly submitted and the error of its rejection was properly preserved

Respondents contend that Petitioner's requested jury instruction was not properly tendered and that the trial court's refusal to submit it was not properly preserved as

error. These allegations are entirely without merit. The requested instruction was based on reasonable inferences that might be drawn from the evidence, which is the appropriate legal standard in Texas. The error in refusing the instruction was properly preserved, as most eloquently demonstrated by the Court of Civil Appeals' discussion of the point on the merits in its opinion.

1. Properly Submitted

Under Texas procedure, a jury instruction is proper "if it finds support in any evidence of probative value or the reasonable inferences that may be drawn therefrom, and if it might be of some aid or assistance to the jury in answering the issues submitted." *Mejia v. Liberty Mutual Ins. Co.*, 544 S.W.2d 690 (Tex. Civ. App.—Houston [14th Dist.] 1976). Under Texas law, it is the duty of the trial court to give the jury, in its charge, the rule to be applied in ascertaining the damages. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87 (Tex. 1973). The record clearly reflects probative evidence on the issue of damages and it cannot, in good faith, be denied that a reasonable inference that might be drawn from such evidence is that the damage award would be subject to federal income taxation. "Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party." *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). The requested instruction set forth the appropriate legal standard and clearly would have assisted the jury in determining the appropriate compensation for the plaintiff.

Contrary to Respondents' assertion, there is absolutely no *caveat* in the *Liepelt* opinion that the jury instruction

must be predicated on evidence in the record regarding federal income taxes. The two questions addressed in *Liepelt,* the admissibility of evidence and the appropriateness of a jury instruction, are separate and distinct from one another. The *Liepelt* holding regarding the appropriateness of such a jury instruction is grounded on policy considerations, including what an average juror is likely to assume regarding taxation of a damage award. The Court's holding in *Liepelt* is clearly predicated on the tax consciousness of the average juror and *not* on the evidence that such juror may have heard during the course of a particular trial.

Submission of the instruction was proper under Texas law and Petitioner's requested instruction complied with the applicable rule of procedure regarding such instructions. Rule 273, Texas Rules of Civil Procedure (Respondent Mobil's Brief in Opposition to Petition—Appendix B).

2. Properly Preserved

Respondents say that the failure to give Petitioner's requested *Liepelt* instruction was not preserved as error because the trial judge did not write the word "refused" on the requested instructions at the time of refusing them and signed his name only to the top instruction of a set of three instructions which he was refusing. Petitioner's requested instruction was clearly refused as it does not appear as part of the court's charge to the jury, but is undisputably part of the official court records. The three instructions Petitioner requested were stapled together in sequential order and the judge simply signed the top one to signify his refusal to submit them.

Respondents' "waiver" argument is entirely spurious, as most clearly evidenced by the fact that the Court of Civil Appeals found no waiver with respect to the point. The Court of Civil Appeals opinion addressed the question on the merits and the court obviously would not have done so had the point been waived as contended by Respondents. (Court of Civil Appeals Opinion—Joint Appendix beginning at page 19).

C. Liepelt is applicable and controlling in this Lands Act case

Although the *Liepelt* case addressed the jury instruction issue in the context of a wrongful death action brought under the Federal Employer's Liability Act (FELA), the holding is clearly applicable in this case arising under the Lands Act.

The Court of Civil Appeals recognized the applicability of the Lands Act to plaintiff's personal injury action against Respondent and its contractual indemnity action against Petitioner. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court held that under the Lands Act the applicable law is federal law with the law of the state adjacent to the fixed platform in question to be utilized only to fill "gaps" in the controlling federal law. Central to the *Liepelt* holding is the established view that questions concerning the measure of damages in actions predicated on federally created rights are federal in character and governed by federal law even when the action is pending in state court. Consequently, the law of the adjacent state in this case, Louisiana, and additionally, the law of the forum state, Texas, with respect to the requested jury instruction was irrelevant and the trial court should have given the requested instruction.

The *Liepelt* decision establishes the existence of federal law and policy on the question of such an instruction so that, under the Lands Act, reference to state law on the question was impermissible. That federal law and policy are expressed generally is clear as there can be no cogent reason for differentiating between such instructions in the context of actions brought under the FELA, the Lands Act, the Jones Act, or any of the other federal acts creating causes of action for personal injury. The evil addressed by this Court is the same in all of these areas and the remedy provided is well suited to all, as well.

Respondent Mobil's position is that *Liepelt* is inapplicable on the basis of the implicit assumption that national uniformity was rejected by Congress in the Lands Act. *See* Respondent Mobil's Brief in Opposition to Petition, p. 9-10. The argument fails because the assumption is incorrect. The Lands Act clearly provides for federal law to be applicable and state law to be used only to fill gaps in the federal law. Obviously, there is no gap in the federal law on the question of the appropriateness of a *Liepelt* jury instruction. The policy considerations relied upon in *Liepelt* clearly apply in Lands Act cases, as well as in FELA cases.

Respondent Gaedecke, disagreeing with Respondent Mobil, says that this is not a federally created statutory cause of action, but instead a common law negligence case. Consequently, the thrust of this Respondent's argument entails the desirability of "adopting" federal law as expressed by *Liepelt*. *See* Respondent Gaedecke's Brief in Opposition to Petition, p. 17-19. As indicated above, this approach is backwards. Federal law applies in the first instance and state law is to be utilized only where there is no federal law on the point.

Respondent Gaedecke's insistence that his cause of action was not derived from the Lands Act is simply incorrect.

In claiming that the plaintiff's cause of action for personal injury was predicated upon common law negligence, as opposed to federal law, Respondent Gaedecke's counsel has misperceived the entire structure of remedies established for fixed platform workers on the outer Continental Shelf. From both the statute and the interpreting case law, it is clear beyond peradventure that the rights of such workers are defined exclusively by the Lands Act and that the applicable law is federal law. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court held that fixed structures on the outer Continental Shelf are islands tantamount to federal enclaves in an upland state. Although the law of the state adjacent to the fixed platform in question may be utilized to fill "gaps" in the controlling federal law, such state law applies, not of its own force, but only as surrogate federal law.

The rights of a fixed platform worker on the outer Continental Shelf against his employer are defined exclusively by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (1978) as made applicable by the Lands Act, 43 U.S.C. § 1333(b). A fixed platform worker's rights against third parties, such as Respondent Mobil herein, are, in turn, governed by the provision of the Longshoremen's Act which defines such third party rights. 33 U.S.C. § 933. *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117 (5th Cir. 1978), *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977), *Aymond v. Texaco, Inc.*, 554 F.2d 206 (5th Cir. 1977), and *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973).

Whether seeking compensation from his employer or litigating against an allegedly responsible third party, a fixed platform worker's rights are derived exclusively from the Lands Act and are controlled by federal law. Where federal law does not address a particular issue, such as in the case of actions for personal injury, the Lands Act provides that the law of the adjacent state is to be utilized to fill the gap in federal law. The state law utilized has effect, not *as state law*, but *as federal law*. As this Court held in *Rodrigue*, "[i]t is evident . . . that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law." 395 U.S. at 357.

The explicit holding of the Fifth Circuit Court of Appeals in *Bourg* is also instructive in this regard:

> [T]he Outer Continental Shelf Lands Act provides for extensive civil remedies for injuries which may occur to a worker on the Shelf. Section 1333(c) provides that the Longshoremen's & Harbor Workers' Compensation Act should apply in cases of disability or death of an employee working on a platform, and § 1333(a)(2) provides the workers on the Shelf any remedy which might be available under State law as long as that remedy is not inconsistent with Federal law. Thus, the Act allows a plaintiff any type of negligence, strict liability, or contract action which would be cognizable under state law. 578 F.2d at 1120.

That Respondent Gaedecke's cause of action could not have been predicated on common law negligence is made clear by the Fifth Circuit Court of Appeals in *Aymond*. There, the plaintiff sought to have applied a Louisiana statute providing for interest from the date of judicial demand as opposed to the date of entry of judgment. The

plaintiff argued that the Louisiana law was applicable independent of the Lands Act, alleging that the matter was in federal court by virtue of the diversity statute as opposed to the Lands Act. The court rejected this theory, analyzing the statutory language of the Lands Act and its interpretation by this Court in *Rodrigue,* and holding that the action was in federal court under the Lands Act so that the Louisiana law, applicable only *through,* not independent of, the Lands Act could be applied only if a gap existed in the federal law as to computation of interest.

Any suggestion that Respondent Gaedecke's action was based on common law negligence because the negligence complained of was land-based, i.e., Respondent Mobil's failure to order evacuation of the platform in a more timely fashion, would be misleading because it is the *status* of a platform worker, *not* his location at the time of an injury or the place of the allegedly negligent act that is controlling. In *In Re Dearborn Marine Service, Inc.,* 499 F.2d 263 (5th Cir. 1974), *cert. denied* 423 U.S. 886 (1975), the Fifth Circuit Court of Appeals held that the rights of the survivors of a platform worker who was killed while on an offshore oil field crew boat were governed by the Lands Act, and not maritime law or the Death on the High Seas Act, 46 U.S.C. § 761 (1975), because his *status* as a platform worker was of greater legal significance than his physical location at the time of his death. In *Louviere v. Shell Oil Company,* 509 F.2d 278, opinion denying rehearing, 515 F.2d 571 (5th Cir. 1975), the Fifth Circuit held Louisiana law applicable, as surrogate federal law pursuant to the Lands Act, in a personal injury action brought by a cook on a fixed offshore platform against the platform owner *and*

the manufacturer and seller of a hot water heater that exploded in the platform's living quarters. Obviously, the plaintiff's *status* as a fixed platform worker was controlling, as opposed to the land-based place of the allegedly negligent manufacture of the hot water heater involved.

As Respondent Gaedecke's personal injury case was, of necessity, predicated on rights created and controlled by the Lands Act, Respondent Gaedecke's assertion of common law negligence in an effort to make the *Liepelt* decision inapplicable is incorrect.

Finally, it is also clear that the *Liepelt* rule of law is controlling in this matter even though the decision was handed down after the trial court's refusal of the requested instruction. In *Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275 (5th Cir. 1980), the question of retroactive application of the *Liepelt* holding was addressed and the position that it should not be applied retroactively rejected. The court found that retroactive application of the rule of law established in *Liepelt* would not result in "manifest injustice." A similar result was reached in *Cazad v. Chesapeake & Ohio Ry.*, 622 F.2d 72 (4th Cir. 1980), a case tried prior to *Liepelt*, but pending on appeal when *Liepelt* was decided, in which the Fourth Circuit reversed for failure to give a proffered instruction which was substantially identical to the instruction required in *Liepelt*.

The *Liepelt* decision was brought to the attention of the Supreme Court of Texas by Supplemental Brief, but was evidently ignored. Petitioner's view is that suggestions of "manifest injustice" in applying *Liepelt* at this stage are not well taken. A greater injustice would be done in not applying that holding in light of the fact that Petitioner informed the trial court of the appropriate law and

requested an appropriate instruction, the giving of which could not possibly have caused any harm. Petitioner is at a loss to explain what more it could have done to protect its rights in this regard.

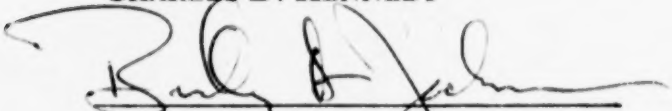
Under these circumstances, this Court should do simple justice by reversing the decision of the Court of Civil Appeals, mandating a new trial.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas and order the case dismissed for want of subject matter jurisdiction. Alternatively, the Court should reverse the judgment and order the case remanded to the trial court for a new trial due to the failure to instruct the jury as requested by Petitioner. Costs should be taxed against Respondent Mobil Oil Corporation.

Respectfully submitted,

CHARLES D. KENNEDY



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CERTIFICATE OF SERVICE

This is to certify that three copies of this Brief for Petitioner have been served on all parties required to be served, *i.e.*, on Respondent by hand delivery at the office of its counsel of record Frank Caton, Esq., Crain, Caton, James and Womble, 3300 Two Houston Center, Houston, Texas 77010, and on the Plaintiff in the trial court by hand delivery at the office of his counsel of record, Joseph D. Jamail, Esq., Jamail, Kolius & Mithoff, 3300 One Allen Center, Houston, Texas 77002, this 22nd day of January, 1981.

CHARLES D. KENNEDY